Aff — 19-577 Judge Davis Aug 14. 74

Chf Jus to write

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 287.

ANN OSBORNE, ADMINISTRATRIX OF JOSEPH OSBORNE, DECEASED, PLAINTIFF IN ERROR,

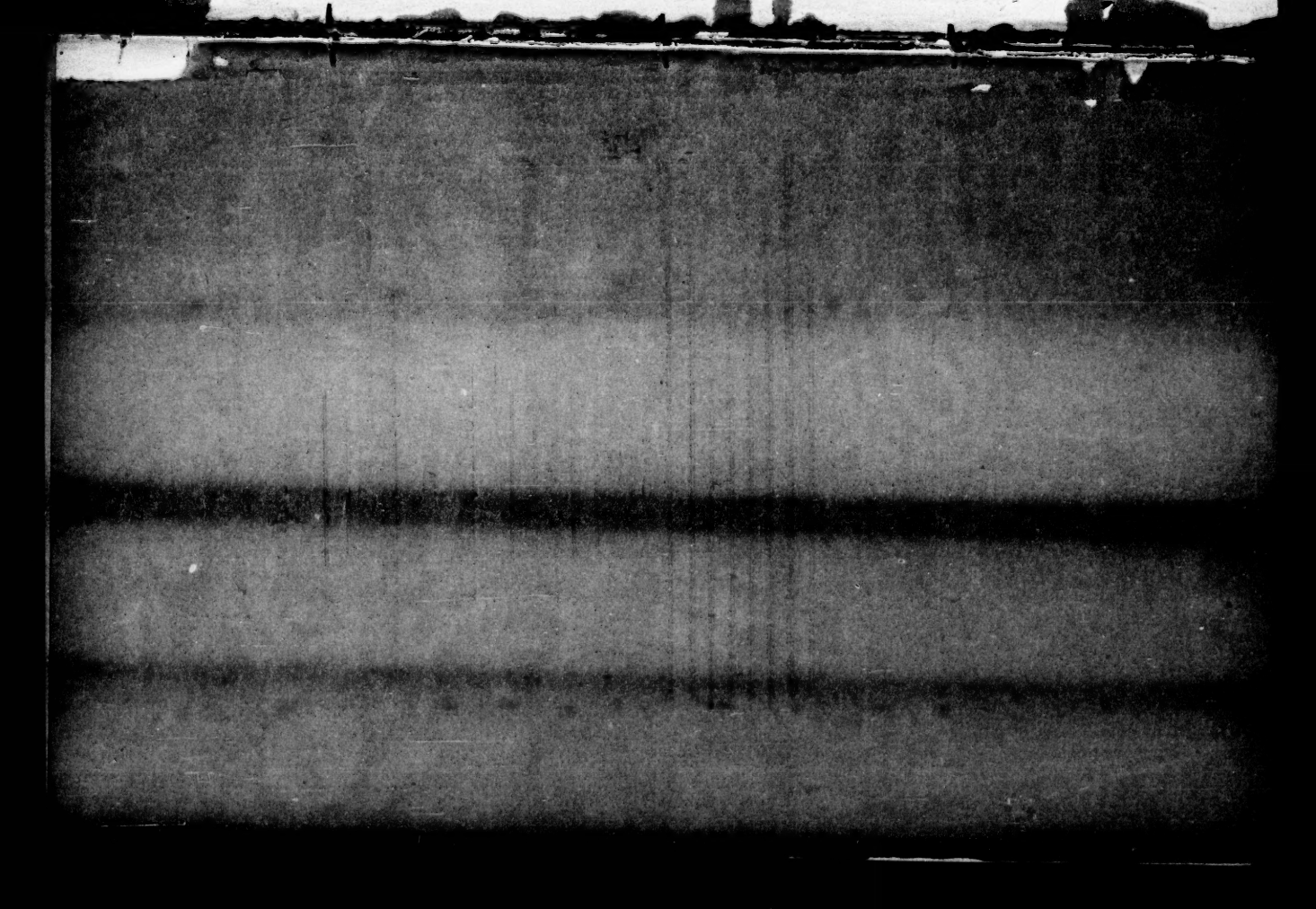
vs.

THE UNITED STATES.

IN ERROR TO THE SUPREME COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

FILED NOVEMBER 27, 1872.

Oct. 2. 1873



SUPREME COURT OF THE UNITED STATES.

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1 UNITED STATES,
Eastern District of Pennsylvania, set:

[SEAL.] The President of the United States to the judges of the circuit court of the United States, in and for the eastern district of Pennsylvania, greeting:

Because that, in the record and process and also in the rendering of judgment in a suit before you, between Ann Osborne, administratrix of the estate of Joseph Osborne, deceased, plaintiff in error, and the United States of America, defendants in error, in a plea of debt, a manifest error has intervened to the great damage of the said plaintiff in error as in their complaint has been stated; and, as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf: You are hereby commanded that, if judgment thereof be given, then, under your seal, you do distinctly and openly send the record and process in the suit aforesaid, with all
2 things concerning them and this writ, so that you have the same before the justices of the Supreme Court of the United States at the city of Washington, on the first Monday of December next, that, the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Witness the honourable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at Philadelphia, this second day of November, A. D. one thousand eight hundred and seventy-two, and in ninety-seventh year of the Independance of the said United States.

SAMUEL BELL,
Clerk Cir. Ct U. S., E. D. of Pa.

3 UNITED STATES,
Eastern District of Pennsylvania, set:

To the United States of America:

Whereas, by a writ of error issuing out of the Supreme Court of the United States, directed to the judges of the circuit court of the United States, holden in and for the eastern district of Pennsylvania in the third circuit, wherein Ann Osborne, administratrix of the estate of Joseph Osborne, deceased, is plaintiff in error and the United States of America is defendant in error, the said judges are directed to send the record and process of a certain suit, with all things concerning them, so that the same may be had before the Supreme Court of the United States to be holden at the city of Washington, in the District of Columbia, on the first Monday of December next, in which suit Ann Osborne, administratrix as aforesaid, was the original defendant, and you, the said United States of America, plaintiff, in a plea of debt, that, the record and process aforesaid being inspected, they, the said Supreme Court of the
4 United States, may cause to be done thereupon what of right ought to be done; and the said Ann Osborne, administratrix, having made an assignment of errors, and given good and sufficient security that the plaintiff in error shall well and truly prosecute her said writ of error to effect, and answer all such costs as, upon an affirmance of the judgment of the said circuit court, may be adjudged to the defendant in error: You are hereby cited to appear (if you see cause) at the said Supreme Court at the time and place aforesaid, to answer to the said writ of error and the errors assigned by the said plaintiff.

Given under my hand and seal this twenty-eighth day of October, one thousand eight hundred and seventy-two.

W. STRONG.
Asso. Jus. S. C. U. S.

(Endorsed:)
I accept service of the within citation in behalf of the United States.
AUBREY H. SMITH,
U. S. Attorney.

NOV. 2, 1872.

5 ANN OSBORNE, ADM'X OF JOSEPH OSBORNE, pl'tff in error, *vs.* THE UNITED STATES, DEF'TS IN ERROR, } No. 7. April sess., 1872.

Pleas and proceeding before the honorable the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, of April sessions, 1872, No. 7.

It is thus contained:

Be it remembered that, heretofore, to wit, on the twenty-fourth day of July, anno Domini one thousand eight hundred and seventy-two, Ann Osborne, administratrix of the estate of Joseph Osborne, deceased, by David W. Sellers, esquire, attorney, come into our said circuit court here and files of record, a writ of error to the district court of the United States for the eastern district of Pennsylvania, which, with an exemplification of the record of the said district court of the United States thereto annexed, being read, is as follows, to wit:

6 *Index.*

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7 UNITED STATES,
Eastern District of Pennsylvania, sct:

[SEAL.] To the United States of America:

Whereas, by a writ of error issuing out of the circuit court of the United States for the third circuit, directed to the judge of the district court of the United States, holden in and for the eastern district of Pennsylvania, wherein Ann Osborne, administratrix of Joseph Osborne, is the plaintiff, the said judge is directed to send the record and process of a certain suit with all things concerning them, so that the same may be had before the judges of the circuit court of the United States for the eastern district of Pennsylvania, in the third circuit, at a session of said court to be holden on the first Monday of October

next, in which suit the United States of America was the original plaintiff, and you, the said Ann Osbourne, administratrix of Joseph Osborne, the defendant, in a plea of debt, that, the record and process aforesaid being inspected, they, the said justices, may cause to be done thereupon what of right ought to be done; and the said Ann Osborne,
8 administratrix of Joseph Osborne, having made an assignment of errors, and giving good and sufficient security that the plaintiff in error shall well and truly prosecute her said writ of error to effect, and answer all such costs as, upon an affirmance of the judgment of the said district court, may be adjudged to the defendant in error: You are hereby cited to appear (if you see cause) at the said court, at the time and place aforesaid, to answer to the said writ of error, and the errors assigned by the said plaintiff in error.

Given under my hand and seal, this twenty-fourth day of June, one thousand eight hundred and seventy-two.

SAMUEL BELL,
Clk Circ't Ct U. S., E. D. of Pa.

(Endorsed:
I accept service of the within citation for the United States.
AUBREY H. SMITH,
U. S. Att'y.

JULY 3, 1872.

9 UNITED STATES,
Eastern District of Pennsylvania, sct:

[SEAL.] The President of the United States to the judge of the district court of the United States in and for the eastern district of Pennsylvania, greeting:

Because that, in the record and process and also in the rendering of judgment in a suit before you, between the United States of America, plaintiffs, and Ann Osborne, administratrix of Joseph Osborne, defendant, in a plea of debt, a manifest error has intervened to the great damage of the said Ann Osborne, administratrix of Joseph Osborne, as in their complaint has been stated; and, as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf:

You are hereby commanded that, if judgment thereof be given,
10 then, under your seal, you do distinctly and openly send the record and process in the suit aforesaid, with all things concerning them, and this writ, so that you have the same before the judges of the circuit court of the United States, for the eastern district of Pennsylvania, in the third circuit, at a session of the said court, to be holden on the first Monday of October next, that, the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Witness the honourable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at Philadelphia, this twenty-fourth day of June, A. D., one thousand eight hundred and seventy-two, and in the ninety-sixth year of the Independence of the United States.

W. GRIER HIBLER,
Pro. Clerk.

11 Pleas before the honorable the judge of the district court of the United States, for the eastern district of Pennsylvania, of August sessions, 1871, No. 19.

It is thus contained:

Declaration.

In the district court of the United States, for the eastern district of Pennsylvania, of August sessions, 1871, No. 19.

EASTERN DISTRICT OF PENNSYLVANIA, *ss:*

Ann Osborne, administratrix of Joseph Osborne, deceased, late of the district aforesaid, was summoned to answer the United States of America, of a plea that she render to the said United States of
12 America, the sum of eighteen thousand dollars, lawful money of the United States, which she owes to, and unjustly detains from, the said United States of America.

And thereupon the said United States of America, by Aubrey H. Smith, their attorney, complain, for that whereas Samuel McMullin, Robert Fletcher, and Joseph Osborne, heretofore, to wit, on the nineteenth day of May, 1870, in the district aforesaid, by their certain writing obligatory, sealed with their seals, and now shown to the court here, the date whereof is the day and year aforesaid, acknowledged themselves, jointly and severally, held and firmly bound unto the said United States of America, in the sum of eighteen thousand dollars above demanded, to be paid to the said United States of America, which said bond or writing obligatory was, and is, subject to a certain condition thereunder written, whereby, after reciting to the effect following to wit: That, whereas, the said Samuel McMullin intended on and after the day of 1870, to be engaged in the business
13 of a distiller, within the fifth collection district of the State of Penn'a, to wit, at Trenton ave., near Alleghany ave., situated in the State of Penn'a, 25th ward of the county of Philad'a, and State aforesaid.

Therefore the condition of the said obligation was such, that if the said Samuel McMullin should in all respects well and truly comply with all the requirements of the law in relation to distilled spirits, then the said obligation should be void; otherwise it should remain in full force. Nevertheless the said plaintiffs say that, after the making of the said writing obligatory, to wit, on the *the* first day of January, 1871, the said Samuel McMullin did not, in all respects, well and truly comply with all the requirements of the law in relation to distilled spirits, in that the said Samuel McMullin did not, then and there, pay or cause to be paid to the said United States a large sum of money, to wit, the sum of six hundred and sixty-seven dollars and sixty-one cents, which
14 said sum of money was, then and there, due to the said United States by the said Samuel McMullin as tax on distilled spirits manufactured by him, the said Samuel McMullin, after the giving of the said bond and before the said first day of January, 1871; nor has the said Samuel McMullin, at any time since, paid or caused to be paid to the said United States the said sum of six hundred and sixty-seven dollars and sixty one cents, or any part thereof, although often requested so to do, but the same to pay, or any part thereof hath hitherto wholly refused.

And the said plaintiffs for assigning a further breach of the said condition of the said writing obligatory, further say that the said Samuel McMullin, after the making of the said writing obligatory, to wit, on the first day of January, 1871, did not, in all respects, well and truly comply with all the requirements of the law in relation to distilled spirits, in that the said Samuel McMullin did not, then and there,

15 pay or cause to be paid to the said United States a large sum of money to wit, the sum of three thousand one hundred and eighty-eight dollars and thirty-three cents, as required by the act of Congress in such case made and provided, which said sum of money was, then and there, due to the said United States by the said Samuel McMullin, as a special tax of four dollars on each barrel of distilled spirits manufactured by him, the said Samuel McMullin, at his said distillery, within the year commencing the first day of May, 1870, and ending the first day of January, 1871, in excess of one hundred barrels, to wit, one thousand one hundred and seventy dollars and forty-three cents for the month of June, 1870; nine hundred and twenty-four dollars and fifty cents for the month of July, 1870; and ten hundred and ninety-three dollars and forty cents for the month of August, 1870; nor has the said Samuel McMullin, at any time since, paid or caused to be paid to the said United States
16 the said sum of three thousand one hundred and eighty-eight dollars and thirty-three cents or any part thereof, although often requested so to do, but the same to pay, or any part thereof, hath hitherto wholly refused.

And the said plaintiffs, for assigning a further breach of the said condition of the said writing obligatory, further say that the said Samuel McMullin, after the making of the said writing obligatory, to wit, on the first day of January, 1871, did not, in all respects, well and truly comply with all the requirements of the law in relation to distilled spirits, in that the said Samuel McMullin did not, then and there, pay or cause to be paid to the said United States a large sum of money, to wit, the sum of one thousand four hundred and seventy dollars, which said sum of money was, then and there, due to the said United States by the said Samuel McMullen as a per diem capacity tax for and on account of the business of distilling carried on by him, the said Samuel
17 McMullin, at his distillery, after the giving of the said bond, on the said nineteenth day of May, 1870, and before the said first day of January, 1871, to wit: The sum of five hundred and seventy-eight dollars for seventeen days' capacity tax at thirty-four dollars per day, and two dollars for one day's capacity tax at two dollars per day, for the month of June, 1870; two hundred and seventy-two dollars for eight days' capacity tax at thirty-four dollars per day, and thirty-six dollars for eighteen days' capacity tax at two dollars per day, for the month of July, 1870; four hundred and forty-two dollars for thirteen days' capacity tax at thirty-four dollars per day, and twenty-eight dollars for fourteen days' capacity tax at two dollars per day, for the month of August, 1870; fifty-two dollars for twenty-six days' capacity tax, at two dollars per day for the month of September, 1870; fifty two dollars for twenty-six days' capacity tax at two dollars per day for the month of October, 1870; and eight dollars for four days' capacity tax at two dollars per day
18 for the month of November, 1870; nor has the said Samuel McMullin at any time since paid or caused to be paid to the said United States, the said sum of one thousand four hundred and seventy dollars, or any part thereof, although often requested so to do; but the same to pay, or any part thereof, hath hitherto wholly refused.

By reason of which said breaches the said writing obligatory became forfeited, and an action hath accrued to demand and have of and from the said Joseph Osborne the said sum of eighteen thousand dollars; yet the said Joseph Osborne, in his life-time, did not pay, nor hath the said defendant, administratrix as aforesaid, since the death of the said Joseph Osborne, as yet paid the said sum of money above demanded, or any part thereof, to the said United States, (although often requested

wherein the United States of America were plaintiffs and Ann Osborne, administratrix of Joseph Osborne, deceased, was defendant, and now remaining among the records of the said court in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said district court, at Philadelphia, this 2nd day of July, in the year of our Lord one thousand eight hundred and seventy-two, and in the ninety-sixth year of the Independance of the United States.

[SEAL.] EDWARD F. PUGH,
Clerk District Court U. S.

(Indorsed:) No. 7, April sess., 1872. Ann Osborne, adm'r'x of Joseph Osborne, pl't'ff in error, vs. The United States, def'ts in error. Return & record of district court. Filed 24th July, 1872.

27 And afterwards, to wit, on the nineteenth day of October, in the year one thousand eight hundred and seventy-two, in our said court here, it is ordered, adjudged, and decreed that the judgment of the district court of the United States for the eastern district of Pennsylvania be, and is hereby, affirmed.

And afterwards, to wit, on the twenty-ninth day of October, in the year last aforesaid, comes the plaintiff in error, by her attorney aforesaid, and files her assignments of error, which are as follows, to wit:

Assignment of errors.

1. The plaintiff assigns as error—

That the circuit court erred in affirming the judgment of the district court;

That the circuit court erred in not reversing the judgment of the district court, and entering judgment against the United States on their demur'er.

DAVID W. SELLERS.

OCT. 28, 1872.

28 Know all men by these presents, that we, Ann Osborne, residing 24 South 17th street; Robert Fletcher, residing 1925 Cherry street; and John Andrews, residing at 1711 Cherry street; Robert Jackson, residing 1735 South street, in the city of Philadelphia, and State of Pennsylvania, are held and firmly bound unto the United States of America in the sum of six thousand dollars, lawful money of the United States, to be paid to the said United States of America; to which payment, well and truly to be made, we bind ourselves, our executors and administrators, jointly and severally, and firmly, by these presents, sealed with our seals, dated this 28th day of October, eighteen hundred and seventy-two.

Whereas, at a circuit court of the United States in and for the eastern district of Pennsylvania, in a suit depending in said court between Ann Osborne, administratrix of Joseph Osborne, plaintiff in error, and The United States of America, defendant in error, judgment was rendered against the said plaintiff, and the said plaintiff having obtained leave to remove the said cause to the Supreme Court of the United States, and being about to file a transcript of the record of said court in said cause in the office of the clerk of the Supreme Court of
29 the United States, seeking to revise the judgment in the aforesaid suit:

Now, the condition of this obligation is such, that if the said Ann Osborne shall prosecute her writ of error with effect, and answer all damages and costs and debt, and all just damages for delay, if she fail to make her plea good, then the above obligation to be void; or else to remain in full force and virtue.

ANN OSBORNE, *Adm'x.* [SEAL.]
ROBERT FLETCHER. [SEAL.]
JOHN ANDREWS. [SEAL.]
ROBERT JACKSON. [SEAL.]

The name of Robert Jackson was underlined before the execution of this bond.

SAMUEL BELL.
W. GRIER HIBLER.

30 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, sct:

I, Samuel Bell, clerk, do hereby certify the foregoing to be a true and faithful copy of the record and proceedings of the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, under a certain writ of error therein lately depending between Ann Osborne, administratrix of Joseph Osborne, deceased, plaintiff in error, and The United States of America, defendant in error.

In testimony whereof I have hereunto subscribed my name, and affixed the seal of the said circuit court, at Philadelphia, this nineteenth day of November, 1872, and in the ninety-seventh year of the Independence of the said United States.

[SEAL.]

SAMUEL BELL,
Clerk Cir. C't U. S., E. D. of Pa.

(Indorsement on cover:) No. 287. Ann Osborne, adm'x of Joseph Osborne, dec'd, plaintiff in error, vs. The United States. E. Pennsylvania C. C. U. S. Filed 27th November, 1872.

REC. 287—2

IN THE SUPREME COURT OF THE

UNITED STATES

No. 287

ANN OSBORNE, *administratrix of*

Joseph Osborne, deceased

plaintiff in error

vs.

UNITED STATES

defendant in error

BRIEF OF PLAINTIFF IN ERROR

DAVID W. SELLERS
for plaintiff in error

No. 287

In the
SUPREME COURT OF THE UNITED STATES

WRIT OF ERROR
TO THE CIRCUIT COURT OF THE UNITED STATES
FOR THE THIRD CIRCUIT

ANN OSBORNE
administratrix of Joseph Osborne, deceased,
plaintiff in error
vs.

UNITED STATES
defendant in error

STATEMENT OF THE CASE

By section 7 of "An Act Imposing Taxes on Distilled "Spirits, and Tobacco, and for other purposes," Approved July 20th, 1868, *15 Statutes at Large 127*, it is provided: — "That every distiller shall, on filing his notice of intention "to continue or commence business with the assessor, before "proceeding with such business after the passage of this "Act, and on the first of May of each succeeding year, make

"and execute a bond in form prescribed by the Commis-
"sioner of Internal Revenue, with at least two sureties, to be
"approved by the assessor of the district. The penal sum
"of said bond shall not be less than double the amount of
"tax on the spirits distilled in his distillery during a period
"of fifteen days, but in no case shall such bond be for a less
"sum than $5000.- The condition of the bond shall be that
"the principal shall faithfully comply with all the provisions
"of law; * * * that he will not suffer the lot
"or tract of land on which the distillery stands, or any part
"thereof, or any of the distilling apparatus, to be encumbered
"by mortgage, judgment or other lien, during the time in
"which he shall carry on said business."

By Section 8 of the same Act it is provided: — "That no
"bond of a distiller shall be approved unless he is the owner
"in fee, unencumbered by any mortgage, judgment or other
"lien of the lot or tract of land on which the distillery is sit-
"uated, or unless he files with the assessor, in connection
"with his notice, the written consent of the" * * *
"judgment creditor or other person having a lien thereon,"
* * * "expressly stipulating that the lien of the
"United States for taxes and penalties shall have priority of
"such" * * * "judgment or other encumbrance"
* * *

Under the foregoing sections, the Commissioner of Inter-
nal Revenue prescribed the form of bond, and on August
3rd, 1868, by Series 4, Number 7, issued certain regulations
and instructions which, *quoad hoc*, is in these words: —

"Every distiller" * * * "before commencing"
* * * "must make and execute a bond on form 30"
* * * "with at least two sureties, to be approved by
"the assessor", * * * "under § 8 no distiller's bond
"*can be approved* unless [the distiller] file in connection with
"his notice" * * * "the written consent of the
"owner of" * * * "any judgment creditor or other

"person having a lien thereon" * * * "expressly "stipulating that the lien of the United States for taxes and "penalties shall have priority." * * * * "This "instrument must be duly acknowledged and executed with "all the formalities required in the conveyances of real estate "and must be duly recorded before the same is filed with the "assessor. As the question to the title to the real estate is "material, the assessor should require of the distiller a prop- "erly certified statement or search of title" * * * "be executed to him and full evidence as to what, if any, "liens or encumbrances exist thereon." * * * "No "assessor will [section 17] approve the bond of any distiller, "until all the requirements of law and the regulations" * * * "have been complied with." *Vol. VIII Int. Rev. Record 58.*

The section in the latter part of the regulations referred to is, in *hæc verba:* —

"*S. 17. 131.*" * * * "No assessor shall approve "the bond of any distiller until all the requirements of the "law and all regulations made by the Commissioner of In- "ternal Revenue in relation to distillers, in pursuance hereof, "shall have been complied with." * * * .

With these in force, the decedent, on May 19th, 1870, executed a distiller's bond as surety, *there being, at that time, liens thereon.* Until these were removed, or the stipulation contained in the Act and referred to in the regulations of the Commissioner of Internal Revenue given, it was believed by him that the bond could not be approved; and without an approval, his principal could not lawfully commence distillation.

Notwithstanding these express prohibitions, the assessor allowed distillation, and the distiller became indebted to the United States, as appears by the verdict, $3923.80 — an amount easily collectable by distraint on and sale of the dis-

tillery if the priority of lien had been required by the assessor in accordance with law.

On suit being brought for this, the defendant pleaded, inter alia, as follows, *page 6 of Record:* —

"I.- And the said defendant saith, that the said plaintiffs should be barred from prosecuting said claim; because she says, that pursuant to the Act under which said writing obligatory was delivered, the same was to create no liability on the part of the said Joseph Osborne, unless the lot or tract of land on which the distillery was situate, was subject to the lien of the tax accruing for distilled spirits, prior to any other lien.

"And that the said defendant saith, at the delivery of said writing obligatory, there were liens against the distillery and the lot or tract of land whereon the same was erected, in the District Court in and for the City and County of Philadelphia, as follows: —

Charles E. Derby et al.,	S. '69, 178.	M. L. D. $1874.67
J. L. Waterman et al.	D. '69, 142.	M. L. D. 2059.11
James Jones et al.	D. '69, 2529.	[judg] 4000.00

"And the said defendant saith, that the said plaintiffs permitted the said Samuel McMullin, without the consent of the said defendant, to distil spirits in said distillery, without previously having the owners of said liens to stipulate that the lien of said plaintiff for taxes and penalties should have priority thereto.

"And the said defendant saith, that the said distillery and lot or tract of ground whereon the same is erected, was sufficient to secure the indebtedness in said declaration set forth if the same had priority to the liens aforesaid, but was otherwise insufficient. And this the defendant is ready to verify."

The United States admitted the truth of the Plea by their demurrer, and this was sustained by a judgment in their favor.

ARGUMENT

It is submitted that all *statutory* bonds are executed with relation to the statutes under which they are given. Their obligation is the same as it would be if the statute were inserted by way of recital *in hæc verba.*

From the statement, it is clear that no bond could *be approved by the assessor* until the lien of the United States for taxes should have priority, and it is equally clear that no distiller could lawfully commence to distil until the assessor approved the bond.

An execution and a delivery of a bond which the assessor could not lawfully approve until the distillery premises were subject to the lien of taxes before all other liens, was the execution and delivery of an escrow.

The United States, by her statutes, said, substantially, we shall have recourse to the distillery premises first, for our taxes, and failing there, we have the sureties on the bond. If the law had been complied with, and the assessor had prohibited distillation until the lien for taxes was the first on distraint or levy, the taxes found due would have been collected — for the Demurrer admits the averment of the Plea "that the said distillery and lot or tract of ground whereon "the same is erected, was sufficient to secure the indebted-"ness."

The loss occurs in this case by the neglect of duty on the part of the assessor. He is the servant of the United States. For loss accruing to the United States, he has given bond. The surety has no action against him on that bond and he cannot compel the United States to subrogate.

The cases on bonds given to the United States, the obligation of which has been denied by sureties, are not in conflict with the position taken by the surety in this case.

Pawling et al. vs. United States, 4 Cranch 219 (1808).

This was a suit on an official bond of a collector of the revenue. The defendants pleaded "that they delivered the "same as an escrow to the principal on the bond, upon con- "dition that if S. J. and W. P. named on the face of the bond "should execute the same as co-sureties, then the bond "should be delivered to the United States as their deed, and "not otherwise."

The bond, without being so executed, was delivered absolutely. It was held that this plea could be proven by parol and that it precluded the United States, if true.

This case put the United States in the same position as any private obligee.

United States vs. Kirkpatrick, 9 Wheaton 720 (1824).

This was a suit on an official bond of a collector of internal revenue, and it was held that the obligors were not liable for duties subsequently imposed by law on collectors; but that their liability was to be restricted to obligations created antecedently. That this limitation was necessarily implied.

This case sustains the doctrine with which this brief sets out, that the statutes under which bonds are given are to be considered as incorporate with the obligation of the bond.

Dair et al. vs. United States, Int. Rev. Record of July 12th, 1873.

This was a suit on a distiller's bond. The plea was similar to that in *Pawling vs. United States, supra*, but the proof was that the bond, on its face, gave no notice to the agent of the United States of the condition on which the sureties

executed it. The opinion admits that if the agent of the obligee had such notice, it would have availed.

In the case before the Court, the law said to the sureties, you are not liable on this bond until the assessor *approves* it; and he was under disability to do that "unless the lot or "tract of land on which the distillery was situate was subject "to the lien of the tax accruing for distilled spirits, prior to "any other lien," as set forth in the Plea. Until that should be the fact, all was *in fieri*.

This disregard of the law, by the assessor, was not of a matter formal and directory, but substantial and mandatory. The license of the assessor would not have justified the distiller, if he had been indicted for violating the law.

The provisions avoided by the assessor and distiller ought to be enforced against the government in the collection of the present tax, as those of a tax law were under circumstances very similar in principle in *French vs. Edwards, 13 Wallace 506.*

DAVID W. SELLERS
for plaintiff in error

In the Supreme Court of the United States.

OCTOBER TERM, 1873.

ANN OSBORNE, *Administratrix*, *Plaintiff in Error*,
vs.
THE UNITED STATES.

No. 287.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1873.

ANN OSBORNE, *Administratrix, Plaintiff in Error,*
vs.
THE UNITED STATES.
No. 287.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

BRIEF FOR THE UNITED STATES.

STATEMENT.

Debt on a distiller's bond under the internal revenue laws, executed by Samuel McMullin, as principal, and the defendant's intestate, as surety, on the 19th of May, 1870, the condition of which was, that the said McMullin should in all respects well and truly comply with all the requirements of the law with relation to distilled spirits.

Plea: That, pursuant to the act under which said bond was delivered, the same was to create no liability on the part of the said Osborne unless the lot or tract of land on which the distillery was situate, was subject to the lien of the tax accruing for distilled spirits prior to any other lien; that there were liens against the distillery and the lot or tract of land whereon the same was erected; that the United States permitted the said

McMullin, without the consent of the said defendant, to distil spirits in said distillery without previously having the owners of said liens stipulate that the lien of said plaintiff for taxes and penalties should have priority thereto; and that the said distillery and lot or tract of ground whereon the same is erected was sufficient to secure the indebtedness in said declaration set forth, if the same had priority to the liens aforesaid, but was otherwise insufficient.

To this plea there was a demurrer, and a joinder of the demurrer.

The court below sustained the demurrer, and gave judgment for the Government.

The defendant brought the case up by writ of error.

ARGUMENT.

The plaintiff in error in her brief seems to rely principally upon section 8 of the act of 1868, ch. 186, (15 U. S. Stat., 128,) which enacts "That no bond of a distiller shall be approved unless he is the owner in fee, unencumbered by any mortgage, judgment, or other lien of the lot or tract of land on which the distillery is situated, or unless he files with the assessor, in connection with his notice, the written consent of the * * * judgment creditor or other person having a lien thereon * * * expressly stipulating that the lien of the United States for taxes and penalties shall have priority of such * * * judgment or other encumbrance."

But to the argument drawn from this statute there are several answers:

1. This bond being voluntarily given by the principal and his surety, and the distiller having had the bene-

fit thereof, the bond is valid, although not in strict conformity with the provisions of law.

United States *vs.* Hodson, 10 Wallace, 395.

2. The statute above quoted, although directory and perhaps mandatory upon the revenue officers, in no way created any agreement between the United States and the sureties on the bond, that the bond would not be accepted until all liens should be discharged. It is a provision with which the sureties had nothing to do, unless it be that it imposed, in connection with their bond, a duty upon them to see that the liens were discharged before the bond was tendered.

3. Although the United States officers ought to have refused to accept the bond, and to allow the principal to distil spirits in accordance with it, until these liens had been discharged or postponed, it does not follow that, if they waived such defects and accepted the bond, the obligors on the bond can take advantage of their action. It is not a matter of mutuality, and the right of objecting that the distiller has not complied with the law in regard to liens belongs to the United States, and not to the obligors.

See Chitty on Contracts, (10th Amer. ed.,) 15.

If there was any agreement between the defendant and his principal, that the bond should not be delivered until the liens were discharged, it does not appear that the United States had any notice thereof, and it does not affect the validity of the bond in respect of them.

Dair *vs.* United States, 16 Wallace, 1.

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